APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2354

LARRY ALAN WARCH,
Plaintiff-Appellant,

v.

OHIO CASUALTY INSURANCE COMPANY,
Defendant-Appellee,

and

OHIO CASUALTY GROUP,
Defendant.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Richard D. Bennett, District Judge.
(CA-02-3715-8-RDB)

Argued: October 25, 2005
Decided: January 30, 2006

Before MOTZ, TRAXLER, and SHEDD, Circuit Judges.

Affirmed by published opinion. Judge Traxler wrote the opinion, in which Judge Motz and Judge Shedd joined.

OPINION

TRAXLER, Circuit Judge:

Larry Alan Warch brought this action against his former employer, The Ohio Casualty Insurance Company ("OCIC"),

alleging that OCIC unlawfully discriminated against him based on his age when it fired him. The district court granted OCIC's motion for summary judgment. For the reasons discussed below, we affirm.

I.

OCIC fired Warch from his position as fraud investigator on April 26, 2002, when he was age 59. Warch's termination should not have been a surprise. Since at least 2000, Warch's supervisors had been giving him negative feedback. On March 1, 2000, the director of Warch's unit, Bill Johansen, sent Warch a letter following up on "several issues pertaining to [Warch's] performance and efforts." J.A. 274. The letter explained how one of Warch's supervisors had discussed company procedures with him "on several occasions" and how there continued to be "shortcomings" that "adversely impact[ed his] personal performance and that of the unit." J.A. 274. Johansen advised Warch to "adopt immediately all procedures and guidelines." J.A. 274.

Shortly thereafter, OCIC changed its internal management structure, but Warch's performance continued to be a source of concern, even under new supervision. The new head of Warch's unit, Bruce Montgomery, met with Warch and advised him that the files he had turned in "lacked any investigative effort," that he "had little or no communication with the claims reps assigned to the case," that he was not leaving his home to conduct field assignments, that he provided "inappropriate" responses to the claims staff that created complaints, and that he needed to "listen more carefully." J.A. 110. Two months later, Warch received a "Formal Counseling Form" stating that he had failed to conduct thorough, concise, and proper investigations, made recommendations to pay claims without gathering all the facts and using all available tools, and failed to "communicate with claims." J.A. 279. OCIC informed

Warch that he would be placed on probation if he failed to improve.

Improvement did not come and, at the end of 2001, OCIC put Warch on probation for six months due to his unacceptable work product. OCIC required Warch to take corrective action and informed him that he would be terminated if he failed to improve. Although Warch received positive feedback in some areas on his 2001 employee evaluation form, the form also stated that he was "not effective," had failed to produce "the product . . . expected of him," was having a "difficult time with the changes that have been made," and needed to "address his work performance and his interpretation of policy provisions." J.A. 286-87. Warch apparently recognized that his performance was problematic, offering family and personal problems as "an excuse for [his] performance." J.A. 289.

OCIC extended Warch's probation. In response to a question from Warch about details of OCIC's concerns, Montgomery explained to Warch:

> We have identified the problems to you many times and each time you state that you understand and then we receive files with the same problems. I feel at this point that we have been more than fair in identifying the problems, explaining what is needed to correct them and the rest will be up to you. . . .
>
> [T]he problems that we see in your work . . . are across the board. You must improve these issues during this extended probationary period.

J.A. 291. OCIC terminated Warch on April 26, 2002, while he was still on probation.

Warch filed a complaint with the Equal Employment Opportunity Commission ("EEOC") in July 2002. Shortly thereafter, the EEOC issued Warch a right to sue letter and

Warch commenced this action. Warch sued under the Age Discrimination in Employment Act ("ADEA"), which forbids employers from "discharg[ing] any individual . . . because of such individual's age." 29 U.S.C.A. § 623(a)(1) (West 1999). Warch pursues his claim under both the "pretext" approach and the "mixed motive" approach. Specifically, he asserts that OCIC's proffered reason for terminating him was pretext for illegal age discrimination and that, even if OCIC had a nondiscriminatory reason to terminate him, age was a motivating factor in his termination.

The district court granted summary judgment to OCIC. On the pretext approach, the district court held that Warch failed to create any genuine dispute that he was meeting his employer's legitimate job expectations or that he was replaced by a substantially younger employee. On the mixed motive approach, the district court ruled that Warch failed to create any genuine dispute, whether based on direct or circumstantial evidence, that age was a motivating factor in his termination.

II.

We review the grant of summary judgment *de novo*. *See Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We construe the evidence in the light most favorable to Warch and draw all reasonable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III.

Warch's claim under the "pretext" approach derives from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and its progeny. *McDonnell Douglas* established a burden-shifting framework for a plaintiff to demonstrate that the purported reason for an adverse employment action, such as termination, was actually a pre-text for unlawful discrimination. *See Mereish v. Walker*, 359 F.3d 330, 334 (4th Cir. 2004). Under this framework, a plaintiff must first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. *See id.*

Generally speaking, to establish a prima facie case of unlawful age discrimination, Warch must show that (1) he is a member of the protected class; (2) he was qualified for the job and met OCIC's legitimate expectations; (3) he was discharged despite his qualifications and performance; and (4) following his discharge, he was replaced by a substantially younger individual with comparable qualifications. *See O'Connor v. Consolidated Coin Caterers Corp.* , 517 U.S. 308, 312-13 (1996); *Causey v. Balog*, 162 F.3d 795, 802 & n.3 (4th Cir. 1998).

After the plaintiff establishes a prima facie case, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the termination. *See Mereish*, 359 F.3d at 334. The employer's burden at this stage "is one of production, not persuasion; it can involve no credibility assessment." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (internal quotation marks omitted). If the employer meets this burden, "the presumption of discrimination created by the prima facie case disappears from the case" and the plaintiff must prove that the "proffered justification is pretextual." *Mereish*, 359 F.3d at 334; *see also Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 255 (1981).

In this case, the district court granted summary judgment to OCIC on Warch's claim under the pretext approach by finding that he failed to produce sufficient evidence to prove that he was meeting his employer's legitimate job expectations or that he was replaced by a substantially younger employee. We address each conclusion in turn.

A. Legitimate Job Expectations

We first address Warch's claim that the district court erred in considering the question of whether he was meeting his employer's legitimate job expectations during the prima facie case. According to Warch, he should only be required to prove that he was "qualified" for the job. Inquiring whether the employee met his employer's legitimate job expectations, Warch argues, improperly collapses the second stage of the *McDonnell Douglas* framework, where the employer brings forth its legitimate, non-discriminatory reason for the termination, into the prima facie case.

Warch's argument that he only needs to show that he is "qualified" for the job, rather than meeting his employer's legitimate job expectations, is foreclosed by circuit precedent. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.* , 354 F.3d 277, 298 (4th Cir. 2004) (en banc) ("Hill has failed to establish a prima facie case of . . . age discrimination because, by her own admissions . . . she has failed to demonstrate that she was performing her job duties at a level that met Lockheed's legitimate expectations."); *Causey*, 162 F.3d at 802 (requiring proof that the employee "was qualified for the job *and* met the employer's legitimate expectations") (emphasis added).

Furthermore, considering an employer's legitimate expectations comports with the purpose of requiring the establishment of a prima facie case — to screen out those cases whose facts give rise to an inference of nondiscrimination, in other words, to eliminate the most common, nondiscriminatory

reasons for the employer's conduct. *See Miles v. Dell*, 459 F.3d 480, 488 n.5 (4th Cir. 2005) (citing *Burdine*, 450 U.S. 253-54). Where an employer hires a new employee, the focus typically is on the qualifications of the candidates. Where, however, an employer fires an employee, the employer is more likely focused on other aspects of the employment, such as poor job performance or infractions of company rules.

Once a person is hired, the distinction between qualifications and job expectations tends to blur. An employee may be qualified when hired, but could fail either to maintain his qualifications or, more commonly, to meet his employer's legitimate expectations for job performance. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.10 (1st Cir. 1979) (noting that the fact that a plaintiff was initially hired generally indicates that he has the "basic qualifications for the job, in terms of degrees, certificates, skills and experience"). In such cases, the prima facie case requires the employee to demonstrate "that he was 'qualified' in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." *Id.* at 1013; *see also La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1409 n.2 (7th Cir. 1984) ("When an employee of long standing is discharged, the more appropriate concern would appear to be his job performance, into which the question of his qualifications might be seen to merge."). Thus, we hold that courts are not required to focus solely on "qualifications" to the exclusion of the employer's legitimate job expectations when evaluating a plaintiff's prima facie case of unlawful termination.

We also reject Warch's contention that consideration of the employer's legitimate job expectations at the prima facie stage improperly allows consideration of evidence the employer would typically present in the second stage of the *McDonnell Douglas* framework, that is, where the employer offers the

legitimate, nondiscriminatory reason for the termination. In support of this argument, Warch relies on the approach announced in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), which held that, "when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff." *Id.* at 660-61. Because OCIC's proffered reason for terminating him was poor performance, Warch argues the district court erred in considering his job performance at the prima facie stage of the inquiry.

In *Cline*, a Catholic school refused to renew the contract of one of its second-grade teachers after it discovered that she had become pregnant a few months before getting married, in violation of the Church's policy against sexual intercourse outside of marriage. The district court ruled that the teacher had failed to establish a prima facie case of sex and pregnancy discrimination. Specifically, the district court concluded that the teacher could not show she was "qualified" because she had violated her promise to live according to the principles of the Church. The Sixth Circuit reversed, holding that the district court had "conflated the distinct stages of the *McDonnell Douglas* inquiry by using [the school's] 'nondiscriminatory reason' as a predicate for finding Cline to have failed to make a prima facie case." *Id.* at 660. Warch contends that, as his case involves a termination where the employer asserted unsatisfactory job performance as the basis for the discharge, the district court made the same error as the district court in *Cline* by considering OCIC's evidence of Warch's poor work performance at the prima facie stage. Warch argues that the district court should have only allowed introduction of this evidence at the second stage of the *McDonnell Douglas* inquiry.

We disagree. Although the plaintiff's burden is "not onerous," it nevertheless requires him to "prov[e] by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-53; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) ("The plaintiff . . . must first establish, by a preponderance of the evidence, a 'prima facie' case . . . ."); *Mackey v. Shalala*, 360 F.3d 463, 468 (4th Cir. 2004) ("'[T]he plaintiff-employee must first prove a *prima facie* case of discrimination by a preponderance of the evidence.'") (quoting *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 959 (4th Cir. 1996)); *Mereish*, 359 F.3d at 334 ("[A]ppellants must first establish a prima facie case of discrimination by a preponderance of the evidence."). And, because a plaintiff must show by a preponderance of the evidence that he met the employer's legitimate job expectations to prove his prima facie case, the employer may counter with evidence defining the expectations as well as evidence that the employee was not meeting those expectations. To require otherwise would turn the plaintiff's burden at the prima facie stage into a mere burden of production, making it "difficult to imagine a case where an employee could not satisfy the 'qualified' [or legitimate expectation] element as defined in *Cline*." *Nizami v. Pfizer Inc.*, 107 F. Supp. 2d 791, 801 n.11 (E.D. Mich. 2000). Diluting this element of the prima facie case "defeats the whole purpose of this first stage of the *McDonnell Douglas* inquiry, which is, after all, to 'create[ ] a presumption that the employer unlawfully discriminated against the employee' by 'eliminat[ing] the most common nondiscriminatory reasons' for the employer's action." *Id.* (quoting *Burdine*, 450 U.S. at 254). In short, we find no impermeable barrier that prevents the employer's use of such evidence at different stages of the *McDonnell Douglas* framework.

Despite our disagreement with *Cline*, however, we are cognizant of the danger that courts might apply the "expectations" or "qualification" element of the prima facie case too strictly in some cases, resulting in the premature dismissal of potentially meritorious claims of unlawful discrimination. *See Cline*, 206 F.3d at 660 ("While the discrete stages [of the *McDonnell Douglas* framework] are meant to facilitate litigants and courts in reaching and resolving that ultimate question of discrimination, when misapplied, they tend to distract courts from the central issue."). A hypothetical raised in *Cline* illustrates the point quite well. *See id.* at 663 n.7.

In the *Cline* hypothetical, a truck driver who loses her driver's license is terminated. A narrow application of the "expectation" or "qualification" element would appear to foreclose the driver from proving her prima facie case, since with no driver's license she would not be able to show that she met the job qualifications or legitimate expectations of her employer for a position as truck driver. Yet, even though the driver's case would never get past the prima facie stage, the employer could have still used the loss of the license as a pretext for illegal discrimination. Evidence tending to show this pretext might be that similarly situated men who lost their licenses were not terminated but, instead, were temporarily suspended until they received new licenses or were transferred to other jobs within the company. *Cline* attempted to remedy this anomaly by looking "at whether an employee met her employer's legitimate expectations *prior* to the event(s) that sparked the termination." *Id.* (emphasis added). Following this lead, Warch argues that prior to the onset of events that OCIC cites as its reasons for terminating him, he was meeting OCIC's performance expectations.

We find this approach to be unworkable, especially where there is no one "event" that "sparked the termination," but instead a long string of performance problems leading up to

firing. The further back in time a court goes to evaluate an employee's performance, the more removed the evidence is from the time of the termination. As we explained in *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982):

> The rationality, hence fairness, of this inference [of unlawful discrimination] obviously decreases as the time gap between last proven satisfactory performance and challenged employment action lengthens. Here, the time lag was almost two years. As common experience in such matters teaches, and as the full record reveals the case here to have been, a great deal can happen to alter things in such a time

Id. at 244. *See also O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 547 (4th Cir. 1995) (holding that a review of an employee's 1989 performance was irrelevant to a determination of whether his performance was satisfactory at the time of his termination in August of 1990), *rev'd on other grounds*, 517 U.S. 308 (1996).

We think the flexibility of the *McDonnell-Douglas* inquiry, when properly applied, already protects plaintiffs from the feared injustice of the *Cline* hypothetical. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 611 (4th Cir. 1999) (holding that "the *McDonnell Douglas* framework should not be applied in a 'rigid, mechanized, or ritualistic' manner") (citations omitted); *cf. Moore v. City of Charlotte*, 754 F.2d 1100, 1105 (4th Cir. 1985) (recognizing that the *McDonnell Douglas* framework is "less useful" in the context of an alleged discriminatory disciplinary decision than in the context of an alleged discriminatory hiring decision). Although on summary judgment an employer is free to assert that the job expectation prong has not been met, nothing prohibits the employee from countering this assertion with evidence that demonstrates (or at least creates a question of fact) that the proffered "expectation"

is not, in fact, legitimate at all. Thus, where application of the qualification or expectation element of the prima facie case seems to preclude an otherwise meritorious claim, the plaintiff is free to demonstrate that the employer's qualifications or expectations are not, in fact, "legitimate."

This flexibility, inherent in the *McDonnell Douglas* framework, is true to the goal of "progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination," *Hicks*, 509 U.S. at 506 (internal quotation marks omitted) (alteration in original), and the recognition that the shifting burdens of *McDonnell Douglas* are "meant only to aid courts and litigants in arranging the presentation of evidence," *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986 (1988). *Cf. Miles*, 429 F.3d at 488-89 (recognizing that there may be circumstances where application of the traditional elements of the prima facie case might improperly screen out cases where a presumption of discrimination could still exist). The same considerations apply to the legitimate job expectations and qualifications prongs of the prima facie case.

We now turn to the question of whether Warch has produced sufficient evidence from which a jury could conclude that he met OCIC's legitimate job expectations. As early as March 2000, before Bruce Montgomery took over as lead of Warch's unit and over two years before Warch was terminated, Warch had already been reprimanded concerning "several issues pertaining to [his] performance and efforts." J.A. 274. His supervisors had advised him "on several occasions concerning [company] procedures" and informed him that he continued to suffer from "shortcomings" that "adversely impact[ed his] personal performance and that of the unit." J.A. 274. Furthermore, after Montgomery took over as the leader of the unit, Warch acknowledged that his own performance failed

to meet OCIC's expectations. *See* J.A. 289 ("I feel an excuse for my performance is necessary. My wife has been ill . . . .").

Warch argues that OCIC's criticisms were too subjective to be considered at the prima facie stage. This complaint will not avail Warch because, if for no other reason, the facts do not support it. OCIC reprimanded Warch based on concrete, specific observations and accompanied its reprimands with explicit instructions on how to improve. For example, although Warch claims the March 2000 letter he received (before Montgomery was his supervisor) dealt only with deficiencies in "file organization" and "office filing procedures, not performance," Brief of Appellant at 23, the letter explicitly addresses "several issues pertaining to [Warch's] *performance* and efforts" and discusses Warch's "shortcomings." J.A. 274 (emphasis added).

Warch similarly contends that counseling he received in May 2001 was not specific and used only general and subjective language. We disagree. The Formal Counseling Form states that Warch was, among other things, "making recommendations to pay claims without gathering all the facts and using all tools given to conduct such investigations" and failing to "communicate with claims." J.A. 279. The form states that Warch's files "lacked any investigation and there was little or no communication with claims." J.A. 279. These are observations of objective facts.

Warch refers to opinions of those who thought he was doing a good job and points to savings he brought the company, arguing that this evidence demonstrates he was meeting OCIC's legitimate performance expectations. As to the opinions, they were offered either by those whose employment with OCIC ended well before Warch's or by third parties who were never employed by OCIC at all. Thus, they lack probative value as to whether Warch was meeting his employer's

legitimate expectations at the time he was fired. *See, e.g.*, *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000) (disregarding plaintiff's opinions of her own performance because "[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff," and finding the opinions of her co-workers "similarly close to irrelevant")(citations and internal quotation marks omitted); *O'Connor*, 56 F.3d at 547 (holding that a review of an employee's 1989 performance was irrelevant to a determination of whether his performance was satisfactory at the time of his termination in August of 1990); *cf. King v. Rumsfeld*, 328 F.3d 145, 149-50 (4th Cir. 2003) (explaining that co-workers' opinions might be relevant in certain situations, but not where they fail to establish what expectations the employer had and whether the employee met them).

Warch also claims he was in the upper third of performers in 2001 based on total savings by investigator. This evidence, even if true, is simply not enough to genuinely dispute the considerable evidence of Warch's repeated failures and negative performance. Faced with such abundant evidence, Warch cannot create a genuine dispute concerning his prima facie case by cherry-picking the record to find one isolated instance where he arguably performed better than the average employee.

Nor has Warch shown that OCIC's expectations were a "sham designed to hide the employer's discriminatory purpose," *Brummett v. Lee Enterprises, Inc.*, 284 F.3d 742, 745 (7th Cir. 2002), or were somehow not "legitimate." Thus, even when viewing the evidence in the light most favorable to Warch, we conclude that no reasonable jury would find that he was meeting OCIC's legitimate performance expectations.

B. Replacement

Warch's prima facie case also fails because he did not produce sufficient evidence from which a reasonable jury could conclude that he was replaced by a substantially younger employee. *See Causey*, 162 F.3d at 802 & n.3. Warch argues for a "flexible analysis" of this element of the prima facie case, claiming that his "replacement" could have been at any location. He also contends that, even if no one physically replaced him, he can satisfy this element because he was a victim of a discriminatory reduction in force.

Warch initially admitted that he was not replaced by anyone. J.A. 90 ("I was not replaced by anybody. [My position] was eliminated."); J.A. 262 (statement in post-termination job application). The EEOC similarly explained that Warch "was disciplined prior to his discharge and not replaced." J.A. 302.[1] Nevertheless, Warch argues that David Hasler, one of Warch's supervisors, suggested that a "'replacement' for the SIU unit might be at any location." Brief of Appellant at 40. Hasler also testified, however, that Warch's work "was probably spread out among various investigators" after he was let go. J.A. 166. Warch has failed to present any evidence genuinely disputing this fact, and, in light of his own admissions, he cannot prevail on his argument that he was replaced at all, much less by a substantially younger employee.

Warch submits that Montgomery used the sale of OCIC's New Jersey unit to substantially reduce the number of older employees. Warch points to *Causey v. Balog*, which stated that a plaintiff terminated as part of a reduction in force "could potentially satisfy the fourth element of a prima facie case by introducing other probative evidence that indicates the

---

[1] The district court ruled that this letter was admissible over Warch's hearsay objection. This ruling is not challenged on appeal.

employer did not treat age and race neutrally when making its decision." 162 F.3d at 802.

When OCIC terminated Warch in 2002, it had recently concluded the sale of its line of New Jersey personal automobile insurance policies. OCIC's David Hasler admitted that over time there would probably be less of a need for investigators in Voorhees, New Jersey. Warch argues that OCIC used its need to reduce investigators as a means to eliminate older workers and points to statistics he contends show a discriminatory pattern. He also submits that "logic and fairness" required the termination of two younger New Jersey employees who were less experienced and needed more guidance.

There are several problems with Warch's argument. Perhaps most importantly, Warch has presented no evidence that he was actually terminated as a part of a reduction in force. OCIC never told Warch he was "downsized" or "laid off" because of a loss of business or budgetary needs. *Cf. Causey*, 162 F.3d at 800 (explaining that Causey's employer told him that his position was being abolished due to budgetary constraints). In fact, OCIC's Hasler concluded that, because there were still previously issued policies in place, "there will still be claims on those, and there were open claims on those at the time, so it's hard to estimate how long it would take for all of that business to roll off." J.A. 182. Moreover, Warch's statement that two younger New Jersey investigators should have been terminated instead of him completely ignores his own long string of performance problems.

Warch's argument is based on nothing more than speculation concerning statistically insignificant information. For example, Warch points to numbers showing the firing, retirement, and termination from his unit of selected investigators over the age of forty. His evidence, however, says

nothing about how the turnover rate of overforty employees differed from that of under-forty employees. A reasonable juror simply could not draw the inferences of age discrimination that Warch claims from much of the statistical evidence he submits. For example, Warch lists the names of six investigators he alleges were over the age of 40 who have either been fired, retired with a company recommendation not to hire, or terminated per mutual agreement. But, one of the listed employees was not 40 when terminated, and two of the remaining investigators left OCIC before control of Warch's unit was assumed by Montgomery, allegedly the source of the discriminatory animus. Thus, the evidence is simply not probative enough to create a genuine issue of fact. *See Fisher v. Asheville-Buncombe Tech. Community College*, 857 F. Supp. 465, 470 (W.D.N.C. 1993) (finding plaintiff's statistical evidence "derived from too small a sample" and "simply too speculative" to be probative of alleged age discrimination).

In light of Warch's own admissions that he was not replaced, OCIC's well-documented problems with Warch's performance, and the absence of any evidence showing that he was the victim of a reduction in force, much less a discriminatory one, no reasonable jury could find that Warch could establish the fourth element of his prima facie case.

IV.

Under a "mixed motive" approach, Warch can establish a claim of age discrimination by demonstrating that his age motivated OCIC's decision to terminate him, even though it was not the sole motivating factor. *See Hill*, 354 F.3d at 284. The district court observed that there is some question as to whether a plaintiff claiming age discrimination can use circumstantial evidence when proceeding under a mixed motive framework. *See id.* at 285 n.2; *Mereish*, 359 F.3d at 339-40 (expressing doubt as to whether the more lenient standard of

proof allowed in Title VII claims applied to ADEA claims, but deciding that, even under this more lenient standard, the appellants' claims failed). Like the district court and the court in *Mereish*, we conclude that Warch's claim fails even when both direct and circumstantial evidence are considered.

Direct evidence must be "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc) (citation and internal quotation marks omitted). Even if there is a statement that reflects a discriminatory attitude, it must have a nexus with the adverse employment action. *See Brinkley*, 180 F.3d at 608 ("To survive summary judgment on the basis of direct and indirect evidence, Brinkley must produce evidence that clearly indicates a discriminatory attitude at the workplace and must illustrate a nexus between that negative attitude and the employment action.").

The direct evidence presented by Warch on appeal consists of the comments of Montgomery and Robert Burgess, another OCIC employee, that a job candidate who happened to be similar in age and experience to Warch would have a hard time getting a job because "hiring people at that age, they didn't get the work out of them that they did younger people." J.A. 211. Warch presents no evidence showing this comment was more than an isolated event or that it had any nexus with the decision to terminate him.[2]

---

[2] Warch also submitted to the trial court statements allegedly made by Montgomery to Frank Kortyka, an OCIC employee, that he wanted to eliminate older workers and have a younger staff. Warch has not relied on these statements on appeal. As to all of the age-related comments Warch introduced, the district court explained that the exact statements, when they were made, and their context were unclear from the record. The record was clear, however, that none of the statements were directed to Warch or referred directly to him.

As to his circumstantial evidence, Warch claims that Montgomery purposefully rigged a performance audit that Warch originally passed so that it would instead show that he failed. This evidence, however, does not create any inference that age was a motivating factor in Warch's termination. Furthermore, there is no evidence that the other well-documented performance problems Warch encountered were somehow linked to the failed audit score.

Warch also argues that his statistical evidence revealed a pattern of unlawful age discrimination, and alleged that two older employees were "forced out" around the same time that Montgomery made his age-biased comments. On this argument, the district court properly concluded that Warch had not presented "probative circumstantial evidence to show that OCIC acted with discriminatory animus." J.A. 59. Warch's statistics do not show complete information about where the data came from, how many investigators OCIC employed, who supervised them, and, most importantly, as the district court observed, "how many investigators under 40 have left the company during the same time period." J.A. 59. Any suggestion that the two older employees who left OCIC around the same time as Montgomery's alleged comments were victims of age discrimination is pure speculation and, without more evidence, simply cannot create an inference of illegal age discrimination.

Accordingly, even when we consider Warch's circumstantial evidence, he fails to create a genuine dispute on his claim under the mixed motive approach.[3]

---

[3] Our ruling that Warch failed to submit sufficient evidence on his claim under either the pretext or mixed motive approaches makes it unnecessary for us to address the parties' arguments concerning who was the "decisionmaker."

V.

Under either his pretext approach or his mixed motive approach, Warch failed to create a genuine dispute that he was the victim of illegal age discrimination. As a result, we affirm the decision of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Civil Case No. RDB-02-3715

LARRY ALAN WARCH,

Plaintiff,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION

Plaintiff Larry Warch ("Warch" or "Plaintiff") has sued his former employer, The Ohio Casualty Insurance Company ("OCIC" or "Defendant") for alleged age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and Maryland law. In his Second Amended Complaint, Plaintiff asserts three causes of action based on age discrimination: 1) pretext claim; 2) Maryland state law claim under Section 9(a) of Article 49B of the Annotated Code of Maryland; and 3) mixed-motive claim. Currently pending are the Defendant's Motion for Summary Judgment, Plaintiff's Motion to Strike Certain Exhibits Attached to Defendant's Motion for Summary Judgment, and Defendant's Motion for Leave to File a Response to Plaintiff's Supplementary Response in Opposition to Defendant's Motion for Summary Judgment. The issues have been fully briefed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons set forth below: 1) Plaintiff's Motion to Strike is GRANTED in part and DENIED in part; 2) Defendant's

Motion for Leave to File a Response to Plaintiff's Supplementary Response is MOOT; and 3) Defendant's Motion for Summary Judgment is GRANTED.

BACKGROUND

Warch, a resident of Carroll County, Maryland, began working at OCIC on or about January 1, 1999, when OCIC purchased Warch's employer, American Insurance Company. (Ans. at ¶ 7.) Warch was a Special Investigations Unit ("SIU") investigator with American Insurance Company and he continued to work in the same position at OCIC after the acquisition. An SIU investigator examines potentially fraudulent claims referred from the Claims Department, which regularly handles determinations concerning a policyholder's coverage and attempts to settle claims. While an SIU investigator, Warch worked out of his home and was assigned to OCIC's Raleigh, North Carolina regional office. (Sec. Amed. Compl. at ¶ 7; Ans. at ¶ 7.) Warch, who was born October 17, 1942, was 59 when OCIC terminated his employment on April 26, 2002. (Sec. Amed. Compl. at ¶ 6.)

OCIC asserts that Warch had a long history of job performance issues at OCIC. Warch, however, believes that he had no significant performance problems before March 1, 2001, around the time when Bruce Montgomery became his new supervisor. (Warch Decl. ¶¶ 13,14, 23.) Montgomery became the Director of SIU Field Operation in February 2001. He was about three years younger than Warch.[1] After becoming a supervisor, Montgomery implemented some changes, such as

---

[1] Montgomery passed away some time before Warch commenced this action. (Def.'s Mot. Summ. J. at 22-3.)

requiring a mandatary referral to SIU of all auto theft claims.[2] In addition, he apparently required SIU investigators to make certain determinations as part of their investigation that Warch did not believe SIU investigators were trained to make, such as checking the appraisal on a vehicle. (Warch Decl. ¶ 20.)

David Hasler, who eventually terminated Warch, is Vice President of Corporate Audit at OCIC's home office. Prior to this position, which Hasler took over on April 15, 2001, he managed the Internal Audit Unit ("IAU").[3] The IAU is primarily responsible for accounting and financial auditing. In a meeting on February 20, 2001, all SIU investigators were told that the SIU was going to be managed by Hasler. In addition, SIU investigators were told that Montgomery was going to work to standardize reporting criteria and SIU procedures. To improve SIU performance, Montgomery was also going to implement an audit process for each of the investigators. On March 8, 2001, Montgomery promoted Robert Burgess from SIU investigator to SIU Field Supervisor. Burgess became Warch's immediate supervisor, but because Montgomery believed that Warch had past job performance problems, and because Burgess was in a new role, Montgomery continued to

---

[2] This apparently, according to Warch and a former co-worker, Frank Kortyka, made Montgomery look like a better manager by creating false referral rates. (Warch Decl. ¶¶ 18-19; 21; Kortyka T. 91-93.) These types of cases, however, apparently required very little investigation. (Warch Decl. ¶ 21.) Kortyka was laid off by OCIC in a reorganization and has filed suit in the United States District Court for the Southern District of Ohio against the company alleging age discrimination. From August 2, 1999 to October 24, 2002, Kortyka managed the Internal Investigation Unit ("IIU"), which is responsible for investigating suspected inappropriate conduct by OCIC employees, vendors, and agents, performing background investigations on new employees, and other security related matters.

[3] At some point in time, although it is unclear exactly when, Hasler managed the IIU.

monitor Warch's performance also. Warch contends that he was more experienced than Burgess, making it difficult for Burgess to properly review files kept by experienced SIU investigators, such as himself. (Bradley Bennett Decl. ¶ 30.)

Although Warch contends that he did not have any job performance problems until March 1, 2001, once Montgomery was his supervisor, OCIC's records indicate that a year prior, on March 1, 2000, Bill Johansen, Assistant Vice President and SIU Director in the Claims Department, gave Warch a formal written counseling for failure to follow SIU procedures. (Def.'s Ex. 18.) On August 30, 2000, Warch was warned by Jay Baas, a Raleigh Manager, in an e-mail, directed to Warch and another employee, about entering improper comments into a company case activity system known as "Ace Notes." (Def.'s Ex. 19.)

Warch believes that these reprimands are overstated and that he performed his job satisfactorily. In addition to Warch's own assertions about his job performance, Warch provides statements from his prior "supervisor," Bradley Bennett, who held various positions at OCIC and was an SIU Analyst in OCIC's home office from 1998 until he was terminated on May 1, 2001. Bennett stated that Warch "was qualified and performed above the level acceptable . . ." (Bennett Decl. ¶ 13.) It is unclear, however, exactly which, if any, of Bennett's positions gave him the responsibility of being Warch's supervisor. Although Bennett provides a job description for his SIU Analyst position, this description does not state that Bennett *supervised* SIU investigators. (Bennett Decl. ¶ 8.)

In early 2001, Montgomery allegedly audited Warch's files and then intentionally manipulated the results to lower Warch's audit score. (Bennett Decl. ¶¶ 9, 12, 22-26.) From this time forward, Warch claims that he was treated unfairly, receiving unwarranted criticism of his files. (Pl's Opp'n at 8-11.) One of these criticisms occurred on March 12, 2001, when

Montgomery met with Warch to discuss his job performance issues. On May 24, 2001, Montgomery issued a formal counseling to Warch for "failure to conduct thorough, concise and proper investigation" and "failure to communication with [the] claims [department]." (Def.'s Ex. 22; Warch T. 204-07; Warch Decl. ¶ 15.) Warch contends that this reprimand was unfair because each investigation is unique and may require different information. (Pl.'s Opp'n at 4; Warch Decl. ¶ 15.) Warch was allocated 60 days to improve his performance.

In June 2001, Warch was evaluated on his performance for the period from March 2000 through December 2000. He received an overall rating of "Good" and was awarded a 3% salary increase. (Warch Decl. ¶ 23; Pl.'s Exs. 51 & 81.) Montgomery was apparently one of the decisionmakers for this raise. (Pl.'s Ex. 51.) A month later, however, on July 24, 2001, his counseling period was extended 30 days. During 2001, Warch also apparently saved OCIC $187,897 through his fraud investigations, placing Warch in the upper third of performers for the year based on this criteria. (Pl.'s Ex. 16)

At some later date, Montgomery met with OCIC's Assistant Vice President of Human Resources, Rick Thomas, to discuss Warch's performance problems and, as a result of this discussion, Thomas approved Montgomery's request to put Warch on probation. On December 6, 2001, after reviewing some of Warch's case files with him, Montgomery and Burgess informed Warch that he was being placed on probation for 60 days because his work product was unacceptable.

Warch was counseled about his work performance problems on December 27, 2001, January 4, 2002, and January 18, 2002. In late January 2002, Warch's 2001 performance evaluation was finalized and he received a rating of "Marginal Performance." (Def.'s Ex. 32.) Warch saw this performance review and wrote in the comment section that the "rating is

acceptable." (*Id.;* Warch T. 255-56.) He noted that he appreciated the consideration he had received from OCIC during a difficult period in his life resulting from his wife's illness. (Def.'s Ex. 32) Warch did not suggest that this performance review was based on a discriminatory reason. (Hasler T. 223-24.)

When Burgess audited all the SIU investigators he supervised, in January 2002, he noted that Warch's performance was deficient on certain claims files. (Burgess T. 55-56; Pl.'s Ex. 9.) On January 30, 2002, Warch's probation was extended 30 days. (Def.'s Ex. 33; Warch T. 257-59) Similarly, on March 8, 2002, Warch's probation was extended another 60 days. (Def.'s Ex. 35; Warch T. 268-72.) Warch was informed that his work needed to improve "across the board." (Def.'s Ex. 35) Burgess counseled Warch on March 21 and April 10, 15, and 16, 2002 about ongoing work problems. (Def.'s Exs. 36, 38-41; Warch T. 268-72.)

On April 23, 2002, Montgomery and Burgess met with Warch at a restaurant in Maryland and reviewed his work performance with him. Montgomery extended Warch's probation again until the beginning of June. (Def.'s Ex. 44; Warch T. 303-09.) The next day, Montgomery called Hasler and told him that the meeting "didn't go very well." (Hasler T. 90-96.)

On April 25, 2002, Hasler and Montgomery met in Fairfied, Ohio, where OCIC's home office is located, and Hasler decided that Warch should be terminated because he had failed to improve his work performance. Hasler believed that OCIC had expended an "extraordinary" amount of time and energy on trying to get Warch to improve his work performance. (Hasler T. 121-22.) Hasler was the individual responsible for determining that Warch should be terminated. (*Id.* at 96-97;113.) Warch contends, however, that Montgomery

was so influential in the decision that he was the real decisionmaker. Both Hasler's and Montgomery's signatures appear on Warch's termination notice. (Pl.'s Ex. 19.) Hasler discussed his decision to terminate Warch's employment with Thomas later that day to ensure that Hasler was following OCIC procedures. Thomas approved of Hasler's decision.

On April 25, 2002, Hasler and Montgomery called Warch and told him that they were not satisfied with his performance and gave him the opportunity to resign. Warch did not want to resign and did not change his mind after thinking it over until the next day. On April 26, 2002, Warch was officially terminated for "unsatisfactory performance." (Pl.'s Ex. 18.)

In an e-mail sent by Warch to Thomas and Hasler in June 2002, he claimed that he was a scapegoat for a SIU program that was not functioning well. (Def.'s Ex. 11; Warch T. 131-33.) Warch accused Montgomery of poorly managing the SIU. Warch did not assert at this time, however, that he was terminated because of his age. Warch claimed that he had evidence to show that his poor performance was fabricated to cover up Montgomery's incompetence, but he never presented this information to Hasler or Thomas. During the same month, Warch informed OCIC that a former coworker and friend, Frank Kortyka, told him that in February or March 2002, Montgomery made some comment to him concerning getting rid of unidentified older SIU investigators. Kortyka could not remember the context. (Warch T. 58; Kortyka T. 60-61.)

On or about July 23, 2002, Warch filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") claiming that Montgomery stated that he wanted to get rid of older investigators and that he rejected an applicant stating that the applicant was too old. Warch stated that there had been three terminations of individuals "in the 45 to 49 year average in one year since Bruce Montgomery took

over the SIU unit" and that these employees were replaced with younger SIU investigators at a lower salary. (Def.'s Ex. 7; Warch T. 52-53.) Within less than one month, on August 16, 2002, the EEOC sent Warch a letter informing him that it was not going to pursue his claim and issued him a right to sue letter. (Sec. Amed. Compl. at ¶ 14.)

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court explained that only "facts that might affect the outcome of the suit under the governing law" are *material*. *Anderson*, 477 U.S. at 248. Moreover, a dispute over a material fact is*genuine* "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The court further explained that, in considering a motion for summary judgment, a judge's function is limited to determining whether sufficient evidence supporting a claimed factual dispute exists to warrant submission of the matter to a jury for resolution at trial. *Id.* at 249. In that context, a court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

However, "[w]hen the moving party has met its responsibility of identifying the basis for its motion, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 101 (4th Cir.

1987) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); Fed. R. Civ. P. 56(e)). Thus, Rule 56 mandates summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. If the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment must be granted. *Anderson*, 477 U.S. at 249-50. Similarly, the existence of a mere "scintilla" of evidence in support of the nonmoving party's case is insufficient to preclude an order granting summary judgment. *Id.* at 252. Furthermore, District Courts have an "affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (*citing Celotex Corp.*, 477 U.S. at 323-24).

A genuine issue of material fact may exist if the evidence presented to the court is sufficient to indicate the existence of a factual dispute that could be resolved in favor of the non-moving party at trial. *Rachael-Smith v. FTDATA, Inc.*, 247 F. Supp. 2d 734, 742 (D. Md. 2003) (*citing Anderson*, 477 U.S. at 248-49). Moreover, any inferences drawn from disputed evidence must be accorded to the non-moving party. *See Matsushita,* 475 U.S. at 587-88; *Pulliam Investment Co., Inc. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

DISCUSSION

I Plaintiff's Motion to Strike

Before reaching the substantive issues raised by Defendant's Motion for Summary Judgment, it is necessary to

first address Plaintiff's motion to strike.[4] Plaintiff moves to strike the affidavits and certain other documents attached to the Defendant's Motion for Summary Judgment. First, Plaintiff moves to strike the entirety of two affidavits, the Affidavit of Gerrie L. Beland and the Affidavit of Robert A. Burgess, on the grounds that they were not based on personal knowledge and contain inadmissible hearsay. Second, Plaintiff moves to strike documents attached to the two affidavits listed above, which are two summaries marked as Exhibit 109 and Exhibit 112. The Plaintiff argues that these exhibits are inadmissible summaries not covered by Rule 1006 and Rule 803(6) of the Federal Rules of Evidence. Third, Plaintiff moves to have two EEOC letters that Defendant obtained through a Freedom of Information Act ("FOIA") request stricken because they are not accompanied by an authenticating affidavit.

A. Affidavits

Plaintiff alleges that the affidavits of Beland and Burgess should be stricken because they do not comply with Federal Rule of Civil Procedure 56(e) in that they are not based on personal knowledge. In *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954 (4th Cir. 1996), referenced in the Plaintiff's motion, the Fourth Circuit explains that the information contained in affidavits submitted in support of or in opposition to a summary judgment motion must be admissible and based on personal knowledge. *See id.* at 962. Summary judgment affidavits cannot be conclusory or based upon hearsay. *Id.* (internal citations omitted). Applying these principles, the Fourth Circuit upheld the lower court's determination to strike certain unsupported, self-serving assertions in the plaintiff's affidavit, as well as statements not

---

[4] The Defendant does not oppose Plaintiff's motion to strike Defendant's Exhibit 28 and, therefore, Plaintiff's motion to strike Exhibit 28 is granted.

based on personal knowledge, or that were hearsay, irrelevant, or conclusory. *See id.* Plaintiff also cites the Fourth Circuit's decision in *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998), upholding the lower court's decision to strike certain of plaintiff's answers to interrogatories. In *Causey* the Fourth Circuit determined that it was not clear whether some of plaintiff's answers to interrogatories were based on personal knowledge. *Causey*, 162 F.3d at 803 n.4. In the answer at issue, the plaintiff stated "that the City gave some employees raises and hired a new consultant after his termination." *Id.* "Causey's oath state[d] that the answers 'are true to the best of my knowledge, *information and belief*.'" *Id.* (emphasis added).

Beland's and Burgess's affidavits contain statements dissimilar to those stricken in *Evans* and *Causey*. Neither Beland's nor Burgess' affidavit states that the information provided is based on "information and belief," but instead both indicate that the affidavit is based on personal knowledge. Both affidavits also state each employee's position and primary responsibilities at OCIC, which serve as the basis for the information provided. *See Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 315-16 (D. Md. 1983) (explaining that even absent traditional litany of personal knowledge and competence to testify, a motion to strike for this reason will fail if these requirement are apparent from the face of the affidavit) (*citing McLaughlin v. Copeland*, 435 F. Supp. 513, 519-20 (D. Md. 1977)). Therefore, the Plaintiff's motion to strike the affidavits of Beland and Burgess is denied.

B. Exhibits Attached to Affidavits

Plaintiff also moves to strike the documents attached to Beland's and Burgess' affidavits. Exhibit 109, attached to the Beland affidavit, is a chart summarizing personnel information of OCIC employees, such as name, department, hiring and termination dates, age, and reason for leaving OCIC. Exhibit

112, attached to the Burgess affidavit, is a summary of scores from audits of SIU files performed by Burgess. Rule 1006 of the Federal Rules of Evidence provides an exception to the "best evidence rule" when the documents are voluminous by enabling a litigant to present the contents of the underlying documents in a chart. *See* Fed. R. Evid. 1006. Under Rule 1006, the underlying documents must be admissible[5] and the underlying materials must be made available for examination by the other party at a reasonable time and place. *See id.* It does not appear from the record that Defendant provided the underlying documents to Plaintiff for his review in a timely fashion, as required by Rule 1006. The Beland affidavit specifically states that the Plaintiff did not request production, during discovery, of some of the underlying documents used to create the summary, marked as Exhibit 109. (Beland Aff. at ¶ 6.) Although both affidavits reference that at least some of the underlaying documents were produced to Plaintiff, neither specify, by document production number or otherwise, what documents were relied upon to make the summaries. (Beland Aff. at ¶ 6; Burgess Aff. at ¶ 7.) Although Defendant first asserted, in a letter to Plaintiff, that Warch had copies of all documents used to generate the summaries, it is evident from later correspondence between the parties that this proved not to be the case. In a letter, dated February 26, 2004, Defendant informed Plaintiff that he did not have sufficient documents to verify the information summarized in Exhibit 109. Similarly, Defendant explained that the Plaintiff, in fact, did not have

---

[5] Defendant asserts that the underlying documents are admissible under Rule 803(6) of the Federal Rules of Evidence, which provides an exception to the hearsay rule allowing business records, that meet the requirements of the rule, to be admitted as evidence.

certain documents used to create Exhibit 112.[6] Although Defendant offers to make these documents available to Plaintiff, upon his request, this offer was not extended until February 26, 2004, at least two weeks after Plaintiff's response opposing Defendant's motion for summary judgment was due to be filed.[7] Therefore, the Plaintiff would not have had the opportunity to verify and challenge the accuracy of these documents prior to the time for filing its response to Defendant's motion. As a result, Plaintiff's motion to strike Exhibit 109 and Exhibit 112 is granted.

C. EEOC Letters

Plaintiff also moves to have two EEOC letters, Exhibit 110 and 111, stricken because these documents are not properly authenticated and contain inadmissible hearsay. Under Rule 902(1) of the Federal Rules of Evidence domestic public documents are self-authenticating if the document bears "a seal purporting to be that of the United States . . . or agency thereof, and a signature purporting to be an attestation or execution." Fed. R. Evid. 902(1). Exhibit 111 is self-authenticating under Rule 902(1) because it is a signed letter from a District Director of the Baltimore Office of the EEOC and bears an EEOC seal. Exhibit 110, however, is not a self-authenticating document under Rule 902(1) because it is an unsigned copy of letter to

---

[6] Defendant asserts that it met its requirement under Rule 1006 because it gave Plaintiff access to review documents that were used to create the summary marked as Exhibit 112. However, this access was provided on July 14, 2003, over five months before the summary at issue was included as an exhibit to Defendant's motion for summary judgment. Plaintiff cannot be required to predict what documents may eventually be relied upon by Defendant to make a summary.

[7] Plaintiff's Response was originally due by January 26, 2004, but the Court granted Plaintiff's request for an extension of time until February 9, 2004.

Warch from an EEOC investigator. Therefore, Plaintiff's motion to strike Exhibit 110 is granted.

Even though Exhibit 111 is self-authenticating, it contains hearsay and, therefore, would be inadmissible unless each instance of hearsay qualifies for an exception. The letter itself qualifies for a hearsay exception under Rule 803(8), which provides that:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8).

However, any hearsay statements included in the letter will also need to qualify as an exception to the hearsay rule to be admissible. *See Lewis v. Velez*, 149 F.R.D. 474, 487 (S.D.N.Y. 1993) (*citing* Fed. R. Evid. 805; *Eng v. Scully*, 146 F.R.D. 74, 79 (S.D.N.Y. 1993)) ("Rule 803(8) does not circumvent the hearsay rule; any double hearsay contained in a report is admissible only if each level of hearsay qualifies independently for a hearsay exception."). An additional level of hearsay exists because the EEOC District Director, who signed the letter, states that he reviewed EEOC records to gather the information provided in the letter. *See Miller v. Field*, 35 F.3d 1088, 1091 (6th Cir. 1994) ("The 'factual findings' in a report qualifying

for a Rule 803(8)(C) exception to the hearsay rule must, however, be based upon the knowledge or observations of the preparer of the report."). These records made by the investigators assigned to Warch's case are also separately covered by Fed. R. Evid. 803(8).

The last level of possible hearsay contained in the letter, Warch's statements documented in the EEOC records, which are specifically referenced in the letter, are not hearsay under evidence Rule 801(d)(2), admission by party-opponent, which provides that a statement offered against a party that is the party's own statement, in either an individual or a representative capacity is not hearsay. Therefore, Plaintiff's motion to strike Exhibit 111 is denied.

II Plaintiff's Citation of Supplemental Authority on Defendant's Motion for Summary Judgment

Plaintiff, although it is not explicitly stated, appears through the language used in its Citation of Supplemental Authority to attempt to employ Federal Rule of Appellate Procedure 28(j)[8] to file this document without asking for leave of the court. Federal Rule of Appellate Procedure 28(j) is inapplicable when a case is pending in district court. Furthermore, Plaintiff has not moved for leave to depart from the filing schedule established by the Court (*see generally*, Local Rule 105.2(a) (D. Md. 2004)) in order to provide additional information and argument in opposition to

---

[8] This rule states, in part: "If pertinent and significant authorities come to a party's attention after the party's brief has been filed--or after oral argument but before decision–a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally . . . ." Fed. R. App. P. 28(j).

Defendant's motion for summary judgment.[9] Therefore, this Court will not consider Plaintiff's Citation of Supplemental Authority and, as a result, Defendant's Motion for Leave to File a Response to Plaintiff's Supplementary Response in Opposition to Defendant's Motion for Summary Judgment is moot.

III Defendant's Motion for Summary Judgment on Plaintiff's ADEA and State Law Claims

A. ADEA Claims

Warch claims that OCIC violated the ADEA because he was terminated based on his age. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "The burden of proof of an age discrimination claim may be satisfied . . . by direct evidence or by circumstantial evidence under a method of proof established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1314 -1315 (4th Cir. 1993). Specifically, "[t]he plaintiff in an ADEA case bears the burden of proving that age was a determining factor in the relevant employment decision." *Mereish v. Walker*, 359 F.3d 330, 334 (4th Cir. 2004).

Generally, a defendant sued for age discrimination can prevail in a motion for summary judgment either 1) by demonstrating that the plaintiff's proffered evidence fails to establish a *prima facie* case of discrimination, or 2) by presenting undisputed evidence showing a legitimate,

---

[9] Plaintiff did not appear to provide the Court with a copy of the unpublished opinion, from the United States District Court for the Southern District of Ohio, referenced in its submission.

nondiscriminatory reason for the adverse employment action. *Malina v. Baltimore Gas and Elec. Co.*, 18 F. Supp. 2d 596, 602 (D. Md. 1998) (internal citation omitted). To avoid summary judgment, the plaintiff must, identify with particularity, admissible evidence of "a stated purpose by the defendant to discriminate on the basis of age" sufficient enough "to permit a reasonable fact finder to reach the conclusion that the reason for the adverse action at issue is intentional age discrimination by the employer." *Id.* at 603. "The evidence must be of sufficient probative force to reflect a genuine issue of material fact." *Id.*

In its recent opinion in *Mereish v. Walker*, the United States Court of Appeals for the Fourth Circuit noted that:

> "We have recognized two ways in which a plaintiff can establish an ADEA claim: first, through evidence showing that age bias motivatedthe employment decision under the so-called 'mixed- motive' method; and second, through circumstantial evidence of discrimination under the 'pretext' method established in *McDonnell Douglas Corp. v. Green* . . . and its progeny."

Mereish, 359 F.3d at 334. The Court noted its earlier *en banc* opinion in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (*en banc*).

1. Plaintiff's Pretext Claim

To establish his pretext claim, using the *McDonnell Douglas* framework, Warch must present a *prima facie* case of discriminatory discharge under the ADEA, by meeting the following elements: "(1) he is a member of the protected class; (2) he was qualified for the job and met the employer's legitimate expectations; (3) he was discharged despite his qualifications and performance; and (4) following his

discharge, he was replaced by someone with comparable qualifications outside the protected class." *Causey*, 162 F.3d at 802 (*citing Blistein v. St. John's College*, 74 F.3d 1459, 1467-68 (4th Cir.1996)); *see also Malina*, 18 F. Supp. 2d at 605; *Tuck v. Henkel Corp.*, 973 F.2d 371, 375, (4th Cir. 1992); *Mitchell*, 12 F.3d. at 1315. However, as the Fourth Circuit noted in *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998), the Supreme Court has rejected strict adherence to the fourth element, outlined above, instead suggesting that replacement by a substantially younger individual would provide a better indicator of an employer's improper discriminatory criterion. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); *see also Malina*, 18 F. Supp. 2d at 604 (discussing that, although the Supreme Court partially overruled the Fourth Circuit's holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995) regarding the final element of proof in a circumstantial case of age discrimination, "it did not address, and hence did not overrule, the Fourth Circuit's analysis of other aspects of age discrimination cases. . . .").

"Under the *McDonnell Douglas* scheme, once the plaintiff proves a *prima facie* case of discrimination, the burden of producing a legitimate explanation shifts to the defendant. If the defendant articulates a legitimate nondiscriminatory explanation which, if believed by the trier of fact, would support the conclusion that discrimination was not a determining factor in the adverse employment decision, the presumption created by the *prima facie* case 'drops from the case,' and the plaintiff bears the ultimate burden to prove that the defendant intentionally discriminated against the plaintiff." *Mitchell*, 12 F.3d at 1314-15 (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Fink v. Western Electric Co.*, 708 F.2d 909 (4th Cir.1983) (adopting the *McDonnell Douglas* scheme for use in ADEA cases)); *see also Texas Dep't of*

Community Affairs v. Burdine, 450 U.S. 248 (1981). In evaluating the defendant's articulated nondiscriminatory reason for the employment decision, the court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination" so that "when an employer articulates a reason for [its treatment of the plaintiff] not forbidden by law, it is not [the court's] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298-299 (4th Cir. 1998) (internal quotations and citations omitted). To rebut the defendant's legitimate nondiscriminatory reason, the plaintiff may offer proof that the defendant's explanation was a mere pretext. *Mitchell*, 12 F.3d at 1315.

It is undisputed that Warch is a member of the protected class under the ADEA because he was over 40 years old at the time he was discharged by OCIC, an employer covered by the ADEA. *See id.* (discussing *prima facie* case for age discrimination under the ADEA); *see also Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (*citing Fink*, 708 F.2d at 914) ("Any ADEA plaintiff must make the elementary showings that he is a member of the protected group and that he has suffered unfavorable employment action taken by an employer covered by the Act.").

OCIC contends, however, that Warch's pretext claim fails as a matter of law because, based on the undisputed facts in the record, he cannot present evidence to establish two elements of the requisite *prima facie* case. First, OCIC argues that it is clear that Warch was not meeting OCIC's legitimate job expectations and, as a result, he was discharged. *See Proud*, 945 F.2d at 797 (*citing Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1417 (4th Cir. 1991) (Plaintiff must prove age was "a determining factor" in employer's decision to take adverse action); *Mitchell*, 12 F.3d

at 1314 -1315 (*citing Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238 (4th Cir.1982) (Age must have been a determining factor in the employment decision)). Second, OCIC claims that Warch cannot show that it replaced him with a substantially younger individual.

a. OCIC's Expectations and Warch's Job Performance

OCIC has offered substantial undisputed evidence, discussed *supra* under "Background," that Warch was not meeting its legitimate job performance expectations, chronicling in detail Warch's poor performance, his supervisors' concerns, and efforts made to encourage Warch to elevate his work to OCIC's standards. Warch, argues that he has presented sufficiently probative evidence to dispute OCIC's contentions. In addition, Warch argues that he has established this element of his *prima facie* case by showing that he met OCIC's expectations.

First, Warch basically alleges that OCIC did not have legitimate expectations because Montgomery and Burgess were not qualified and established flawed policies. Warch claims that, under Montgomery's command, SIU investigators were required to undertake tasks that they were not trained to do, such as checking the appraisal on vehicles claimed to be damaged and conducting other tasks that were actually the Claim Department's job. Warch alleges that Montgomery set up a policy where all auto thefts had to be investigated by SIU investigators, but that these types of cases did not require much investigation. In addition, Burgess' inexperience apparently made his audits of the more experienced investigators, such as Warch, flawed. To support these assertions, Warch points, not only to his own opinions, but also those expressed by Bradley Bennett, a former OCIC employee terminated by the company on May 1, 2001. This individual's opinions, who was not qualified as an expert and was only at OCIC two to three

months after Montgomery and Burgess assumed supervisory roles over Warch, is not sufficiently probative evidence to create a genuine dispute of material fact. Similarly, Warch's subjective disagreement with his superiors qualifications, policies, and procedures does not establish that OCIC's expectations were somehow unreasonable and illegitimate. Warch's disapproval of Montgomery's and Burgess' decisions and his perception that they were unfair also does not establish evidence of age animus.

Second, to support that he was meeting OCIC's performance expectations, Warch puts forward statements by Bennett, his supposed previous supervisor, that Warch "was qualified and performed above the level acceptable . . ." (Bennett Decl. ¶ 13.) However, Bennett was terminated May 1, 2001, approximately three months after Montgomery was promoted and two months after Burgess became a supervisor in the SIU unit. Bennett was not employed at OCIC for virtually the whole year leading up to Warch's termination, during the very period in which most of Warch's performance problems occurred. In addition, it does not appear from the record that Bennett was actually Warch's supervisor and, therefore, in a position to truly know about Warch's job performance.

Warch also presents his own contentions that he met OCIC's performance expectiaions. It is well settled, in this Circuit, that Warch's unsubstantiated belief that his work performance was adequate is insufficient to establish a *prima facie* case of discrimination. *See King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir. 2003); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *see also Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988) (stating that the plaintiff's own opinions and conclusory allegations do not have sufficient "probative force to reflect a genuine issue of material fact."). In addition, Warch claims that

his 2000 "Good" performance review and 3% raise indicate that he met OCIC's performance expectation. (Warch Decl. at ¶ 23; Pl.'s Exs. 51 & 81.) However, it is undisputed that the majority of Warch's performance problems occurred in 2001 into 2002, when he was eventually terminated.

Warch asserts that he should be able to survive summary judgment because, during one point in 2001, he was in the upper third of SIU investigators based on financial savings from fraud investigations. (Pl.'s Ex. 16.) The fact that an employee's "performance was comparable to his coworkers' is *not* proof that [his] performance met [his employer's] legitimate job performance expectations." *King*, 328 F.3d at 149. "It is *only* proof that his work looked like that of his coworkers, a fact that, without more, does not bear on the critical inquiry." *Id.; see also Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir. 1998) ("[A]lthough the affidavits put forth by Tinsley document the fact that certain co-workers, Bank customers, and attorneys believed Tinsley was doing a good job, they fail to address whether management honestly believed that Tinsley was doing a good job.").[10] In addition, there is no evidence that OCIC had a savings quota for SIU investigators or that this was somehow a core performance measure when evaluating SIU investigators. Even viewing the facts in the light most favorable to Warch, this Court finds that the large number of undisputed performance reprimands make it such that a reasonable jury could not find that he met OCIC's performance expectations based on this fact alone.

---

[10] In addition, Defendant asserts that none of the co-employees relied upon by Warch to verify his satisfactory work performance were "in a position to evaluate his overall performance at the time any adverse action was taken against him." (Def.'s Summ. J. Mot. at 17.)

a. Replacement by a Substantially Younger Employee

To establish a *prima facie* case, Warch must also show that he was replaced by someone with comparable qualifications outside the protected class. *See Causey*, 162 F.3d at 802. The Supreme Court has rejected strict adherence to this standard, suggesting that replacement by a substantially younger individual would provide a better indicator of an employer's improper discriminatory criterion. *See O'Connor*, 517 U.S. at 312-13); *see also Parrish v. United Steelworkers of Am.*, 1997 WL 355635, at 2 (4th Cir.1997); *Devan v. Barton-Cotton, Inc.*, 1998 WL 183844, at 4 (4th Cir.1998). At issue in this case is whether Warch was, in fact, replaced at all.

Warch has made conflicting statements concerning whether anyone replaced him at OCIC. Warch has stated that he "was not replaced by anybody" at OCIC and that his position was eliminated. (Warch T. 24-25; D. Ex. 3.) However, Warch has also stated that he thought that his position was not replaced in Maryland, but that Wendy Williams, working out of Toledo, Ohio, took his job because she received his company car.[11] (Warch T. 74-76.) Kortyka also has stated that Williams replaced Warch. (Kortyka T. 70.) Warch, however, has not presented information that Williams was servicing his territory or working on cases previously assigned to him. (Warch T. 77.) In fact, he did not think that Williams was qualified to handle the cases that he had covered. *Id.* Warch has not presented any evidence to show that his region, or the 30 to 40 cases he

---

[11] Wendy Williams is 32 years old and was hired as an investigator by OCIC on July 1, 2002. Montgomery, with Hasler's agreement, also decided to hire some additional people to cover the "western group." (Def.'s Mot. Summ. J. at 20; Hasler T. 193, 215-16.) In addition, OCIC hired one new employee, Brian Biggs (28 years old), for the East to replace Wayne Beasley who Montgomery terminated for poor performance after a short time on the job. (Hasler T. 190-92; 217; 228.)

handled as an SIU investigator, were assigned to another employee, let alone a substantially younger employee. In fact, Hasler explained that Warch's cases were "picked up by other - the investigators that still remained" employed. (Hasler T. 244-45.) *See Causey*, 162 F.3d at 802 (explaining that reassignment of a terminated employee's work to existing employees does not satisfy the replacement requirement).

Warch contends that one employee did not have to replace him to satisfy this element of the *prima facie* framework. Warch contends, using Kortyka for support, that OCIC has an "overall staffing" approach (Pl.'s Opp'n at 22), where "you reduce your staffing level by one, and you increase your staffing level by one" and, therefore, Williams replaced Warch. (Kortyka T. 79- 80.) Warch also supports his theory by highlighting that Hasler stated that OCIC did eventually hire more SIU investigators. (Hasler T. at 180.) Warch's theory, that the next SIU investigator hired replaced him, does not comport with the articulated standard that the plaintiff must prove that he was *replaced. See O'Connor*, 517 U.S. at 312-13; *Causey*, 162 F.3d at 802. For positions, such as Warch's, where multiple employees have the same title and responsibility for conducting similar tasks, the replacement requirement would largely be meaningless if it could be automatically met when a company decides an additional worker is needed. Even viewing the facts in the light most favorable to Warch, a reasonable jury could not find that he has proffered sufficient evidence to show that OCIC hired an employee to replace him, let alone establish that he was replaced by a substantially younger worker.

Therefore, Warch has failed to establish a *prima face* case under the *McDonnell Douglas* framework and Defendant's Motion for Summary Judgment is granted as to the first cause of action setting forth a pretext claim.

2. Plaintiff's Mixed-Motive Claim

In his third cause of action, Warch seeks to establish an ADEA claim, alternatively, under the "mixed-motive" method. The "mixed-motive" method was set forth by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (O'Connor, J., concurring) pursuant to which, in a mixed-motive case, the burden of persuasion was shifted to the employer only where the plaintiff demonstrated by direct evidence that an illegitimate factor played a "substantial role" in an adverse employment decision. Pursuant to that framework, a plaintiff must prove "through direct evidence that age was a substantial motivating fact in the terminating decision." *Mereish*, 359 F.3d at 339 (*citing Price Waterhouse*, 490 U.S. at 258). If a plaintiff can make this showing, then, to avoid liability, the defendant must prove that it would have made the same decision even if it did not consider the plaintiff's age. *Id.*

In response to the Supreme Court's decision in *Price Waterhouse*, Congress altered the framework, in the Civil Rights Act of 1991, for claims arising under Title VII. *Mereish*, 359 F.3d at 339. Congress lessened the burden of proof required under *Price Waterhouse* for Title VII plaintiffs first, by allowing plaintiffs to put forth both direct and *circumstantial* evidence to show that the defendant acted with discriminatory animus,[12] and second, by disallowing defendants to avoid liability by showing that it would have made the same decision even absent discrimination. *See id.* at 339-40. In *Mereish v. Walker*, the Fourth Circuit noted that it "had not occasion to decide whether the mixedmotive decision under the Civil Rights Act of 1991 applied to the ADEA," although the

---

[12] In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court held that direct evidence is no longer necessary in mixed-motive cases alleging employment discrimination under Title VII.

Fourth Circuit has expressed doubt that it does. *Id.* at 340 *(citing* Hill, 354 F.3d at 285 n.2); *see also EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 n.1 (4th Cir. 2004) (The Fourth Circuit has "previously assumed, without deciding, that direct evidence is still a prerequisite for a mixed-motive analysis in ADEA cases."). Therefore, this Court will analyze Warch's claim under the more stringent *Price Waterhouse* framework, as well as the less stringent mixed-motive method.

Under the more stringent framework, Warch must present direct evidence: "(1) that he . . . is an employee covered by the ADEA; (2) that he . . . suffered an unfavorable employment action by an employer covered by the [A]ct; and (3) that this occurred under circumstances in which the employee's age was a determining factor, in the sense that but for the employee's age, the employee would not have suffered the adverse action." *Malina*, 18 F. Supp. 2d at 605 (*citing Tuck*, 973 F.2d at 374-75; *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995) *rev'd on other grounds*, 517 U.S. 308 (1996)). The first two elements are undisputed - Warch is an employee covered by the ADEA and he was terminated. Therefore, under this framework, Warch must present "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Warfield-Rohr Casket Co., Inc.*, 364 F.3d at 163 *(quoting Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995), *abrogated by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).

All statements about age do not automatically carry animus. "[S]tatements about age, unlike statements about race or gender, do not rest on a we/they dichotomy and therefore do not create the same inference of animus" because everyone expects to someday grow old. *Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999); *see also EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992)

(holding an employer's comment that the employer needed to "attract newer, younger people" and needed "young blood" failed to establish direct evidence of age discrimination); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994) (statement by employee in charge of lay-off decision that "there comes a time when we have to make way for younger people" in and of itself creates no inference of age bias, but merely "reflects no more than a fact of life and as such is merely a truism that carries with it no disparaging undertones.") (citation omitted).

Warch presents the following statements that allegedly directly reflect a discriminatory attitude based on age:[13] 1) a statement allegedly made by Montgomery, in February or March 2002, to Kortyka, which Kortyka shared with Warch in June 2002 about getting rid of older workers (Kortyka T. 58.); 2) a statement allegedly made by Montgomery, according to Kortyka, that "he wanted a younger staff and was eliminating older investigators" (Pl.'s Ans. to Def's First Set of Inter., Ans. No. 6); and 3) a statement allegedly made independently by both Montgomery and Burgess to Beasley, another SIU investigator, to the effect "that they were finding out they couldn't get the work out of older people that they could get out of younger people."[14] (Beasley T. 53-56.)

The exact statements, when they were made, and their context is unclear from the record because there are varying reiterations of the statements. What is clear, however, is that

---

[13] Defendant alleges that these statements are inadmissible hearsay. Plaintiff did not address this contention in his response. Although there may be an argument that these statements are inadmissible, the Court will analyze whether they give rise to age animus and whether they bear directly on Warch's termination.

[14] This is the only statement Plaintiff discusses in its Opposition to Defendant's Motion for Summary Judgment.

none of the statements were made to Warch or refer directly to him.[15] There must be some "nexus between the alleged discriminatory statements" and the decision by OCIC to terminate Warch. *O'Connor*, 56 F.3d at 549 *rev'd on other grounds*, 517 U.S. 308 (1996) (*quoting Clay Printing Co.*, 955 F.2d at 942). In *O'Connor* the Fourth Circuit held that a statement made directly to the plaintiff, two weeks prior to his discharge, that "O'Connor, you are too damn old for this kind of work" alone did not meet the requisite nexus between the statement and the alleged discriminatory employment action. *O'Connor*, 56 F.3d at 549 *rev'd on other grounds*, 517 U.S. 308 (1996). "[I]solated and ambiguous statements . . . are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination." *Id.* at 548-49 (citations omitted).

Warch argues that the statements discussed above bear directly on the contested employment decision because Montgomery and Burgess were the real decision-makers in connection with his termination. In *Russell v. McKinney Hosp. Venture*, the Fifth Circuit discussed that discriminatory comments of another could be attributed to a decision-maker if the decision-maker "rubber stamped" that person's desires because then he would inherit the discriminatory taint. 235 F.3d 219, 226-227 (5th Cir. 2000). Although OCIC states that Hasler determined that Warch should be terminated, Plaintiff contends that he was just the "hatchet man" because Montgomery reported information about Warch's performance to Hasler. (Pl.'s Opp'n at 29.) Both Hasler's and Montgomery's signatures appear on Warch's termination notice, although Montgomery signed a few days after Hasler. (Pl.'s Ex. 19.)

---

[15] It is also noteworthy that, in fact, Montgomery was one of the decision-makers for Warch's 2001 raise, which was based on his performance in 2000. (Pl.'s Ex. 51.)

Hasler has explained, however, that he did not blindly rubber stamp a recommendation by Montgomery, but instead independently determined that OCIC had expended enough resources on Warch's performance problems. (Hasler T. 113, 122.) Hasler also vetted his decision to terminate Warch with Thomas, OCIC's Vice President of Human Resources. (Hasler T. 97-98; 103-05.) In addition, as discussed *supra* in section III.A.1.a., Warch blamed his termination on Montgomery's and Burgess' incompetence, not on his age. (*See e.g.*, Warch T. 255.) Warch has not shown that he would not have been fired, "but for" his age and cannot provide adequate evidence of sufficient probative force to create a genuine issue of material fact. There is no evidence that Hasler or Thomas acted with age animus when they decided to fire Warch for his long record of poor work performance. (Hasler T. 225.) Furthermore, Plaintiff cannot show that Hasler and Thomas merely rubber stamped a specific recommendation by Montgomery to terminate Warch.

Next, this Court will apply the more lenient mixed-motive framework, which would allow Warch to put forth both direct and circumstantial evidence to show that OCIC acted with discriminatory animus. Warch argues that there was a pattern of age discrimination at OCIC, in that six SIU investigators over 40 have left the company since December 1999. (Pl.'s Ex. 87.) Warch does not explain if this sampling was selected from all SIU investigators, in all regions, or who supervised the investigators. Warch does not share how many SIU investigators OCIC employs and how many investigators under 40 have left the company during the same time period. In addition, of the six SIU investigators Warch lists, none were terminated for poor performance, like Warch. Instead, one left as the result of a layoff (who was "recommended for rehire"), at least two decided to take early retirement, and still another quit without good cause. (Pl.'s Ex. 87.) Warch has not presented probative circumstantial evidence to show that OCIC acted with discriminatory animus. After reexamining the facts

surrounding Warch's termination under the more lenient mixed-motive standard, there is no evidence to prove that age was a motivating factor.

Therefore, Defendant's Motion for Summary Judgment is granted as to Warch's third cause of action setting forth his mixed-motive claim.

3. State Law Claim

In his second cause of action, Warch claims that OCIC violated Maryland state law, Section 9(a) of Article 49B of the Annotated Code of Maryland, because it discriminated against him based on his age. Defendant argues that this Court does not have supplemental jurisdiction over this state claim because the provision cited by Warch "does not protect any substantive rights Warch could claim OCIC violated." (Def.'s Mot. Summ. J. at 12.) Warch did not respond to Defendant's argument. Courts in this District have previously held that Article 49B of the Annotated Code of Maryland does not create a private cause of action. *See Malina*, 18 F. Supp. 2d at 611 *(citing Jordan v. CSX Intermodal, Inc.*, 991 F. Supp. 754, 756, n.1 (D. Md.1998)). Therefore, Defendant's Motion for Summary Judgment as to Warch's state claim is granted.

CONCLUSION

For the foregoing reasons, 1) Plaintiff's Motion to Strike is GRANTED in part and DENIED in part ; 2) Defendant's Motion for Leave to File a Response to Plaintiff's Supplementary Response is MOOT; and 3) Defendant's Motion for Summary Judgment is GRANTED. The Court will issue a separate Order consistent with this Opinion.

/s/_____
Richard D. Bennett
United States District Judge

Dated: September 30, 2004